Filed 1/25/13 P. v. Zapata CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARCUS ZAPATA, Defendant and Appellant.	C067249 (Super. Ct. No. 09F06018)

A jury found defendant Marcus Zapata guilty of three counts of second degree robbery (counts 1-3; Pen. Code,[1] § 211), evading a peace officer (count 4; Veh. Code, § 2800.2, subd. (a)), assault with a firearm (count 5; § 245, subd. (a)(2)), attempted second degree robbery (count 6; § 664/211), misdemeanor resisting arrest (count 7; § 148, subd. (a)(1)), and attempted murder (count 9; § 664/187, subd. (a)). The jury also found true allegations defendant personally used a firearm in the commission of counts 1, 2, 3, and 6. (§ 12022.53, subd. (b).)

---

[1] Further undesignated statutory references are to the Penal Code.

Sentenced to 23 years and 8 months in state prison,[2] defendant appeals, contending (1) his conviction for robbery of Wells Fargo Bank (count 1) must be reversed because robbery of a bank is not a crime; (2) there is insufficient evidence to support his conviction for assault with a firearm (count 5); (3) there is insufficient evidence to support his conviction for attempted murder; and (4) the trial court's failure to stay his sentence for resisting arrest (count 7) violated section 654.

We shall reverse defendant's convictions for robbery of Wells Fargo Bank (count 1) and assault with a firearm (count 5), stay his sentence for resisting arrest (count 7) and otherwise affirm the judgment. The reversals do not affect the length of defendant's sentence since the sentence on count 1 had been stayed and the sentence on count 5 had been made concurrent. In addition the stayed sentence on count 7 had been made concurrent.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:00 p.m. on August 8, 2009, defendant and Jordan Latour entered a Wells Fargo Bank in Rocklin wearing masks and carrying guns. Both men waived their guns and told everyone to get on the floor. Defendant jumped over the teller counter and emptied the money from tellers Iona Crivineau and Anne Beaumont's cash drawers into a bag, while Latour remained in the customer area where he pointed his unloaded gun at bank employee Ali Khosroshahi from about a foot away. Defendant

---

[2] Defendant was sentenced to the middle term of three years on count 2, plus a consecutive 10 years for the firearm enhancement; a consecutive one year (one-third the middle term) on count 3, plus three years and four months (one-third of mandatory 10 years) for the firearm enhancement; a concurrent two years (the middle term) on count 4; a concurrent three years (the middle term) on count 5; a consecutive eight months (one-third the middle term) on count 6, plus three years and four months for the firearm enhancement; a concurrent six months in jail on count 7; and a consecutive two years and four months on count 9. Defendant's sentence on count 1 was stayed pursuant to section 654.

then jumped back over the counter, and he and Latour ran out of the bank and into the parking lot, where getaway driver Loureece Clark was waiting for them in a dark-colored four-door car with paper plates. Defendant and Latour got into the car, and the three men sped off.

Rocklin Police Officer John Constable was dispatched to the bank. As he approached the bank, a citizen directed him to the getaway car, which had just left the parking lot. Constable caught up to the car and activated his overhead lights. The car pulled out from stopped traffic and drove onto the freeway. Constable followed the car westbound on Interstate 80 for several miles. They reached speeds of 115 miles per hour. Believing it was too dangerous to keep pace with the car, Constable eventually slowed down and continued to follow the car at a safe distance and speed. He lost sight of the car near Madison Avenue and concluded the car likely exited the freeway at the Madison Avenue exit. He advised dispatch that he believed the car exited the freeway at Madison Avenue and continued westbound on Interstate 80 for approximately five miles in case he was mistaken. After failing to locate the car, Constable reversed course, intending to exit at Madison Avenue and continue his search for the car.

The car did in fact exit the freeway at Madison Avenue and pulled into the parking lot of a strip mall at Madison Avenue and Hillsdale Boulevard. Defendant and Latour immediately got out and ran behind the building, while Clark drove away in the car. At least one of them was still wearing a face mask. A man sitting in his car in the parking lot observed the men exit the car. Believing the two men were going to commit a robbery, he contacted Sacramento County Sheriff Deputy Duke Lewis, who was sitting in his car in a church parking lot across the street from the mall.

Lewis immediately drove across the street to the strip mall and confronted defendant and Latour behind the building. As Lewis exited his car and began to approach the men, another car entered the parking lot and Lewis diverted his attention from defendant and Latour. When he turned back around, Latour was pointing a revolver at

him. Lewis ran, and Latour shot him in the shoulder. Lewis continued running until he reached the church parking lot across the street.

Meanwhile, Rocklin Police Officer Michael Alway, who also had been dispatched to the bank and had been following Constable on the freeway, exited the freeway at Madison Avenue to search for the car while Constable continued westbound on Interstate 80. Alway drove past the strip mall and into a residential area. When he reached the residential area, he made a U-turn and headed back toward the mall. While in route, he saw several people in a church parking lot, including two deputies, attempting to get his attention. When he stopped to see what was going on, he learned Lewis had been shot, and drove Lewis to the hospital.

After learning that Lewis had been shot, California Highway Patrol Officer Michael McDonough, who also had been looking for the car off of Madison Avenue, began searching for defendant and Latour. He eventually located the two men sitting beneath a tree near the freeway. He identified himself as "Highway Patrol," pointed his rifle toward them, and told them to put their hands up. They did not comply; rather, they stood up and ran up a hill toward Madison Avenue where they were apprehended by additional officers.

DISCUSSION

I

Defendant's Conviction for Robbery of Wells Fargo Bank Must Be Reversed Because Robbery of a Bank Is Not a Crime

Defendant contends, and the People concede, that his conviction for robbery of Wells Fargo Bank (count 1) must be reversed because a bank is not a person. We agree.

Defendant was convicted of three counts of robbery (counts 1-3). Count 1 named Wells Fargo Bank as the victim; count 2 named Beaumont as the victim; and count 3 named Crivineau as the victim.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of

force or fear." (§ 211.) As the statute states, robbery is an offense against a person. (*People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369.) A bank is not a person; thus, defendant's conviction for robbery of Wells Fargo Bank cannot stand.

II

Defendant's Assault with a Firearm Conviction Is Not Supported by Substantial Evidence

Defendant contends there is insufficient evidence to support his conviction for assault on Khosroshahi in the bank with a firearm. He is right.

Defendant was charged in count 5 of an amended information with "assault on Ali Khosroshahi, with a firearm . . . ." At trial, the prosecution argued defendant was guilty of assault with a firearm on an aiding and abetting theory. Specifically, the prosecution's theory was that Latour was close enough to strike Khosroshahi with his unloaded gun had he attempted to do so. As defendant points out, the problem with the prosecution's theory is that absent evidence Latour actually attempted or threatened to use the firearm as a bludgeon, defendant cannot be guilty of assault with a firearm.

" ' "The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" ' " (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1332.) " ' "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact]." ' " (*Ibid.*)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) It "'requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery) . . . .' [Citation.]" (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139.)

Where an assault with a firearm charge is based on the use of a firearm as a bludgeon, there must be evidence that the defendant actually attempted to strike or hit the purported victim. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1463 (*Bekele*), disapproved on another ground in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14.)

In *Bekele*, the defendant "pointed a gun at [the victim], with his arm fully extended, and said, 'Don't.' The gun was about four feet from [the victim's] face." (*Bekele, supra,* 33 Cal.App.4th at p. 1460.) The court held that "[a]bsent any evidence that the gun was loaded, or that [the defendant] attempted or threatened to use it as a bludgeon, there was no proof of assault with a firearm." (*Id.* at p. 1463.) The court rejected the People's assertion that the defendant could have used the gun as a bludgeon, where "there was no evidence of a threat, or effort, to" do so, finding that "[a]bsent any effort or threat to use the gun as a bludgeon, this theory of assault with a firearm cannot apply." (*Ibid.*)

Here, the People do not dispute defendant's claim that "there is no evidence whatsoever that Latour ever attempted or even threatened to strike Khosroshahi with the unloaded gun." Rather, the People assert that sufficient evidence supports a finding that defendant committed assault with a firearm on Khosroshahi based on *defendant's* own conduct, namely "displaying the gun, waiving it around, and directing everyone to get down on the floor . . . ."

As defendant points out, and the People do not dispute, that theory was never presented to the jury. In *People v. Guiton* (1993) 4 Cal. 4th 1116, our Supreme Court "distinguished cases in which the prosecution relied on a *factually* inadequate theory from those in which the prosecution's theory was *legally* inadequate. [The court] held that if the inadequacy of proof is purely factual, 'reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.' [Citation.] [The court] further held that if the inadequacy is legal, the 'rule requiring reversal applies, absent a basis in the

record to find that the verdict was actually based on a valid ground.' [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 37-38.)

Because the prosecution elected to proceed solely on the legally inadequate theory that Latour had the present ability to strike Khosroshahi with the unloaded firearm he was carrying, there is no basis in the record to find that the verdict was actually based on a valid ground. Accordingly, defendant's conviction for assault with a firearm (count 5) must be reversed.[3]

III

There Is Sufficient Evidence to Support the Jury's Implied Finding That Defendant and Latour Had Not Reached a Place of Temporary Safety When Latour Shot Deputy Lewis

Defendant next contends that he and Latour had reached a place of temporary safety when Latour shot Lewis; therefore, he "is not liable for Latour's unexpected, unilateral attempt to murder Officer Lewis." We are not persuaded.

As set forth above, section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." However, "the crime of robbery is not confined to the act of taking property from victims. The nature of the crime is such that a robber's escape with his loot is just as important to the execution of the crime as obtaining possession of the loot in the first place. Thus, the crime of robbery is not complete until the robber has won his way to a place of temporary safety." (*People v. Carroll* (1970) 1 Cal.3d 581, 585.) "Temporary safety is not tested based on subjective impressions or recklessness of the robber but on an objective measure of safety following the initial taking." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1292.) The "issue to

---

[3] The same result would obtain if the inadequacy is characterized as factual. Because the prosecution elected to proceed solely on the inadequate theory, we must assume the jury's verdict actually did rest on that inadequate theory. (See *People v. Marshall*, *supra*, 15 Cal.4th at pp. 37-38.)

be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

"'Whether . . . the robber has reached a place of [temporary] safety is ordinarily a question of fact; a jury's implied finding on the issue will be upheld so long as supported by substantial evidence. [Citations.]' [Citation.] We review the whole record, in a light most favorable to the judgment, to determine whether it discloses substantial evidence--evidence which is reasonable, credible and of solid value--whether direct or circumstantial, and even if exculpating inferences might seem to us reasonable as well." (*People v. Haynes*, supra, 61 Cal.App.4th at p. 1291.)

Here, defendant and Latour were being actively pursued by Constable, Alway, and McDonough when Latour shot Lewis. Moreover, when defendant, Latour, and Clark arrived at the strip mall, defendant and Latour "immediately ran out of the car" toward the mall and behind a building and appeared to be "in a huge hurry." Indeed, at least one of them was still wearing a mask. Latour shot Lewis minutes later.

Substantial evidence supports the jury's implied finding that defendant and Latour had not reached a place of temporary safety at the time Latour shot Lewis.

IV

Defendant's Six-month Jail Sentence for Misdemeanor Resisting Arrest (Count 7) Must Be Stayed Pursuant to Section 654

Lastly, defendant argues the trial court violated section 654 by failing to stay his concurrent six-month jail sentence for the misdemeanor offense of resisting arrest, in light of his two-year consecutive sentence for the felony offense of evading an officer because both offenses resulted from the same conduct -- "the evasion on Highway 80." We agree.

Section 654, subdivision (a), provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under

the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

During closing argument, the prosecution argued that "[r]esisting arrest . . . is also related to the conduct that was exhibited during the evasion on Highway 80. [¶] During the course of the evading, the crime of resisting arrest was also violated." Thereafter, the prosecutor explained how defendant, Latour, and Clark's conduct in fleeing from Officer Constable amounted to resisting arrest. That was the sole theory of liability presented to the jury on that the resisting offense. Accordingly, we assume the jury found defendant guilty of resisting arrest based on that theory.

Because the evading and resisting offenses arose from a single act, defendant's concurrent six-month jail sentence for misdemeanor resisting arrest should have been stayed under section 654.

We note several errors in the abstract of judgment filed on January 24, 2011. Under section 1, count 4, the sentence is listed as a concurrent eight months ("1/3MT 2 YRS = 8 MOS"); however, the reporter's transcript reflects that defendant was sentenced to a concurrent two years (the middle term). Under section 1, count 4, the "section no." is listed as "28002.2(a)"; however, defendant was convicted of violating Vehicle Code section 2800.2, subdivision (a). Under section 1, count 9, the sentence is listed as a consecutive two years ("1/3 LT of 5 YRS = 2 YRS"); however, the reporter's transcript reflects that defendant was sentenced to a consecutive two years and four months (one-third the middle term of seven years). Finally section 1 fails to list defendant's sentence on count 7.

DISPOSITION

Defendant's convictions on count 1 and 5 are reversed, and his sentence on count 7 is stayed pursuant to section 654. The judgment is otherwise affirmed. The trial court is directed to amend the abstract to conform with the disposition and to reflect that: defendant was convicted in count 4 of violating Vehicle Code section 2800.2,

subdivision (a) (not "28002.2(a)"), and sentenced to a concurrent two years (the middle term); defendant was sentenced in count 9 to a consecutive two years and four months (one-third the middle term of seven years); and that the total time listed in section 8 should reflect a term of 23 years 8 months. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.